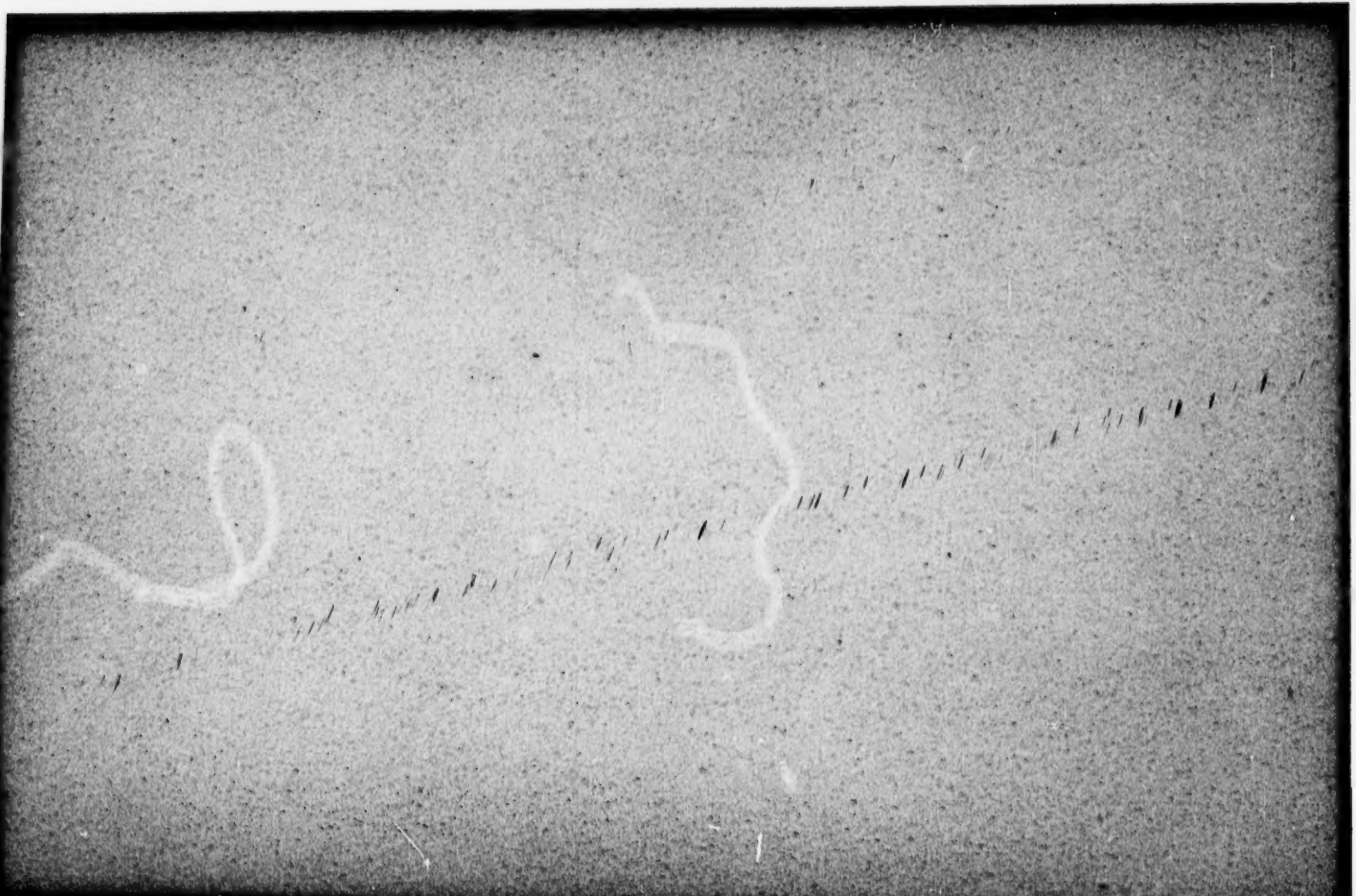

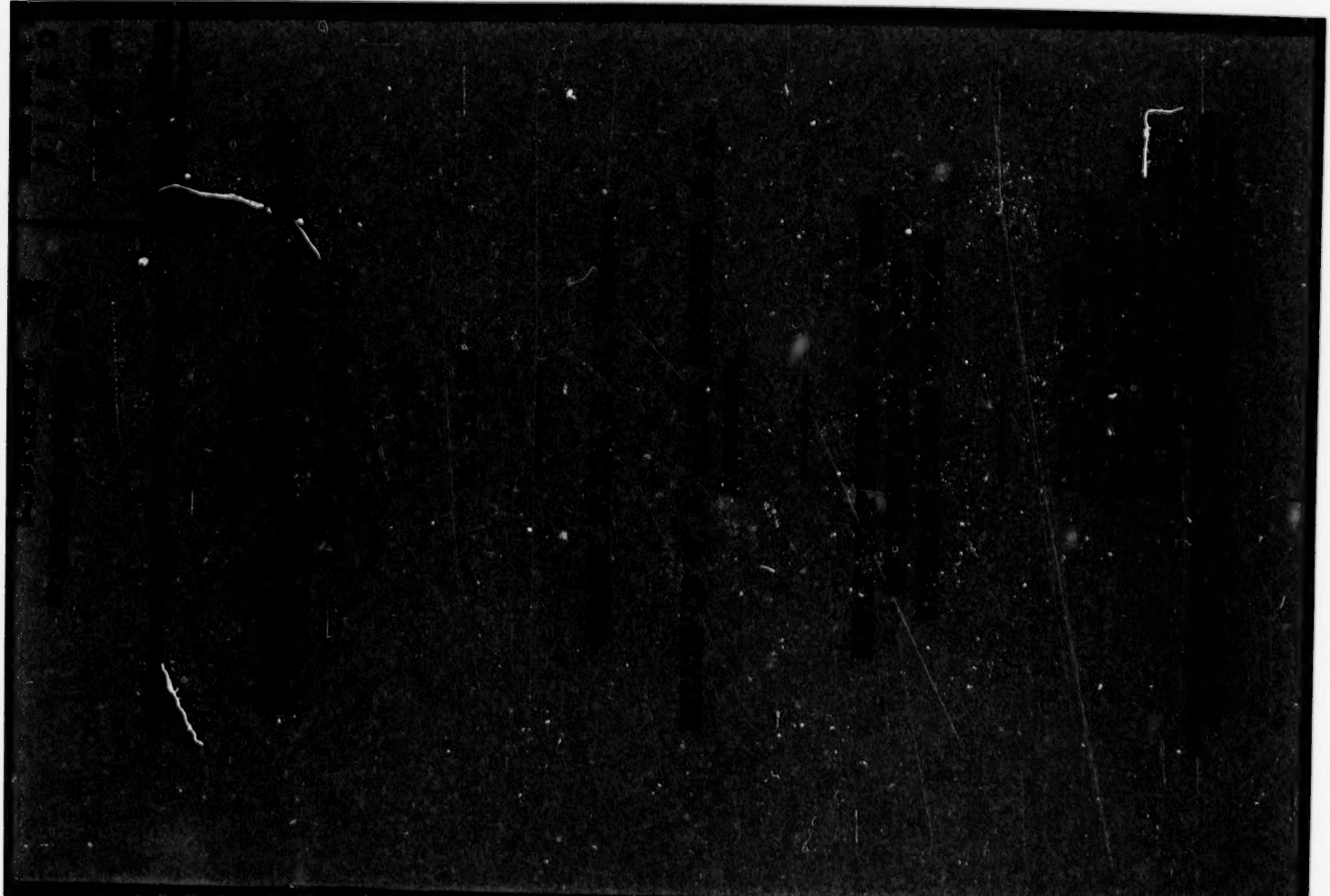

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1989

ERNEST SIMON, Et Al., *Petitioners,*

v.

ESTATE OF W. P. ALLEN, DECEASED, Et Al., *Respondents.*

REPLY TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

To The Honorable Supreme Court of the United States:

Now comes the estate of W. P. Allen, Deceased, and files this Reply to the Petition for Writ of Certiorari on file.

QUESTIONS PRESENTED

1. Whether Petitioners' contentions have been preserved for review by this Court.

2. Whether a substantial federal question of due process is presented with respect to the following:

   a. A jury finding that a given transaction was a sale, and judgment accordingly;

b. A judgment that in a sales transaction, the seller is liable in damages for cotton that was paid for but missing from storage;

c. A judgment of liability based on jury findings of bad faith and failure to disclose material facts.

3. Whether an undue burden on interstate commerce is created by a judgment that in a sales transaction, the seller is liable in damages for cotton that was paid for but missing from storage.

This brief will not consider questions pertaining to principles of mutual mistake because such questions pertain to the judgment in favor of the other Respondent. As to Question One, the Petition should be denied because Petitioners have not presented their contentions in a timely manner. As to Questions Two and Three, the Petition should be denied because Petitioners have not presented a substantial federal question. See *Zucht v. King*, 260 U.S. 174 (1922).

STATEMENT OF THE CASE

The Opinion of the Texas Court of Civil Appeals correctly stated the nature and result of this case in its Opinion published at 497 S.W.2d 800. Since Petitioners argumentative statement of the case contains extraneous conclusions as to the pleadings and evidence, we present our own statement of the case.

This case centers around a transaction of September 14, 1966. In the transaction, a close corporation by the name of Ernst Cohn and Company transferred warehouse receipts representing approximately 9000 bales of cotton to W. P. Allen, a sole proprietorship doing business as Allen and Co., for a consideration of $870,-

336.80. On November 3, 1966, Allen discovered that substantially all of the cotton represented by such receipts was missing from storage. Subsequent discoveries indicated that Ernest Simon, the president and 99% shareholder of Ernst Cohn and Company, had grounds for suspicion that the cotton was missing from storage at the time of the transfer of September 14, 1966. Mr. Allen killed himself in December of 1966, and suit was brought by his widow against various Defendants to recover for the bogus cotton. Mrs. Allen was joined in the suit by First City National Bank of Houston, who had financed Allen in the transaction. Mr. Simon and the close corporation are Petitioners herein, seeking review of the adverse judgments of the Texas courts.

Petitioners have distorted the record by asserting that the transaction of September 14, 1966 was in some sense a financing transaction. Petitioners had the power of sale of the cotton involved, and the jury found from the evidence that Petitioners sold the cotton to Allen. See Special Issues 14; 475 S.W.2d at 803. Although Respondents failed to prove Simon's actual knowledge that cotton was missing before September 14, 1966, Respondents secured favorable jury findings on Simon's bad faith, Simon's failure to disclose material facts known to him at the time, and Simon's alter-ego relationship with Ernst Cohn and Company. Where applicable, some of the pertinent portions of the record will be dealt with under specific points in the argument in this brief.

REASONS WHY THE WRIT SHOULD BE DENIED

1. Petitioners have failed to preserve their contentions for review by this court.

2. Petitioners have failed to raise substantial federal questions of due process. From the evidence, the jury found that Petitioners sold cotton to Allen, and that a large amount of that cotton was missing from storage at the time of the sale. A judgment against Petitioners on such findings is logical and not arbitrary.

3. Any injury to Petitioner's reputation has been caused, not by unconstitutional state action, but by Petitioners' own acts and deeds.

4. Petitioners have failed to show any affect on interstate commerce by the judgment and decisions below.

ARGUMENT

I.

PETITIONERS HAVE FAILED TO PRESERVE THEIR CONTENTIONS FOR REVIEW BY THIS COURT.

Petitioners did not raise their due process and interstate commerce arguments until motion for rehearing after the Texas Supreme Court had refused to review the judgment and decision of the lower courts. Under Texas law such a belated attempt constitutes a waiver of any erroneous ruling pertaining to such points. See Tex. Rules of Civ. Proc. 469 and 374 (Appendix A); 3 Tex. Juris. Sec., "Appeal and Error", Sec. 192 and authorities there cited. Similarly, this court has often ruled that it is too late to raise a federal question for the first time in a petition for rehearing after decision of an appellate court. *E.g., Herndon v. State of Georgia,* 295 U.S. 411 (1935); *Waters Pierce Oil Company v. State of Texas,*

212 U.S. 112 (1909); *McCorquodale v. State of Texas*, 211 U.S. 432 (1908).

II.

PETITIONERS HAVE FAILED TO RAISE SUBSTANTIAL FEDERAL QUESTIONS OF DUE PROCESS.

A. The Evidence Supports Jury Findings of a Sales Transaction.

On the evidence in the case, the jury found that the transaction between the parties was a sale of cotton from Petitioners to Mr. Allen. 475 S.W.2d 802-803. Petitioners have sought to challenge that fact in two appellate courts of the state of Texas and now seek to have this court review the finding on due process grounds. In order to present the question before this Court, Petitioners have distorted the record by asserting that the transaction was a financing arrangement, giving no record references to such an assertion because there are none.

The evidence to the jury was that the transaction was structured as a sale of cotton. The banker involved testified the transaction was a sale. (Oliver, S.F. 48-54; 108-112). Petitioners prepared and delivered sales invoices on the cotton involved. (Pl. Ex. 5, 6 and 7). After the transaction, Petitioners prepared and delivered a sales confirmation pertaining to the transaction. (Oliver, S.F. 277-287) In Petitioners' accounting records, Petitioners wrote "sold to Allen & Co." to describe the transaction. (Simon S.F. 472-479; Pl. Ex. 72). In addition to the documentary evidence, Mr. Simon stated in deposition

testimony that he assumed Mr. Allen would have "merchandise". (Simon S.F. 478).

The Court should not be mislead by Petitioners arguments about lack of fair play. The Respondents secured jury findings based on ample evidence in support of their theories of recovery; in reality, Petitioners' claim is not that they were treated unfairly but merely that the trial judge and jury and two Texas appellate courts have held against the unsupported arguments.

B. There is no Violation of Due Process by a Judgment that, in a Sales Transaction, the Seller is Liable in Damages for Cotton that was Paid for but Missing from Storage.

The lower court interpreted statutes under the Uniform Commercial Code to require Petitioners to return money they received for non-existent cotton. The statutes involved are set forth in the lower court opinion; briefly, the court held that Petitioners had breached express warranties of quantity, implied warranties of merchantability, and the statutory warranty that the transfer was "rightful and *fully effective* with respect to the title to the document and the goods it represents." Petitioners challenge this holding as arbitrary.

It is logical and rational to require that a seller stand behind his merchandise and account for it; and if, as here, the merchandise cannot be delivered at a minimum the seller should be required to pay back monies paid for non-existent goods. See T.B.C.C. § 2.711(a). Otherwise, the seller gets the buyer's money for absolutely nothing. See *Livingston v. Anderson*, 58 S.E. 505, 508 (Ga. Civ. App. 1907). Such a holding is not only logical, it is supported by abundant precedent in cases not involving doc-

uments of title. 51 Tex. Juris. See "Sales" § 333 and cases there cited. Similarly, with respect to transactions covered by documents of title, pre-code authority supports the analysis that a transfer of a warehouse receipt warrants the existence of the goods. WILLISTON, CONTRACTS, Section 1063; WILLISTON, SALES, Section 422, Section 432; *Continental Trust Company v. Bank of Harrison*, 134 S.E. 775 (Georgia 1926); *Livingston v. Anderson*, 58 S.E. 505 (Ga. Civ. App. 1907); *Standard Seed Company v. Balfour Guthrey & Company*, 208 NYS 2d 966, 999 (N.Y. Sup. 1960).

C. The Judgments of the Lower Courts Have Not Violated Petitioners' Rights Pertaining to Reputation.

Petitioners assert that the judgment and decision below violate Petitioners' constitutional rights by blemishing their reputation without due process. The cases cited by Petitioners discuss arbitrary and capricious state action, such as the lack of a hearing, that is not present in the instant case.

Petitioners were sued under various theories that entitled the Respondents to judgment. The jury considered evidence on bad faith and fraudulent concealment and alter-ego and found against the Petitioners. Based on the various jury findings, all of which were supported by evidence, the Trial Court entered its judgment. Throughout the proceedings, Petitioners had able counsel in the Trial Court and on appeal. Liability could have been found against Petitioners on numerous theories more injurious to Petitioners than those in the printed opinion. If Petitioners' reputations have been injured, it is because of Petitioner Simon's acts and culpable deeds and not

because of the actions of the jury, the lawyers, and the judges involved in this case.

III.

NO UNDUE BURDEN ON INTERSTATE COMMERCE IS CREATED BY A JUDGMENT THAT IN A SALES TRANSACTION, THE SELLER IS LIABLE IN DAMAGES FOR COTTON THAT WAS PAID FOR BUT MISSING FROM STORAGE.

Without authority, Petitioners assert that the lower court judgment and decision "must have an affect on interstate commerce, and call for review by the Court." The unsupported premise of this unsupported argument lies in Petitioners' unsupported assertions that the transaction involved was a security transaction and not a sale. As previously discussed, the finders of fact found conclusively that the transaction was a sale. Any analysis of the affect on interstate commerce should begin with the facts as found by the jury, and the logical judgment based on those facts, and not with mere unsupported arguments by Petitioners.

It is difficult to imagine any reason the judgment below would create an undue burden on interstate commerce. There is no indication that the State of Texas is striving to discriminate against trade coming into the state; there is nothing to indicate any attempt to contain products within the state; in short, there is no indication of any attempt to treat those engaged in interstate commerce in any disadvantageous way. Under the principles set forth in the instant case, a Texas citizen selling cotton to a citizen of another state would nonetheless be liable for

damages if cotton were missing from storage. Since Petitioners have not indicated with specificity how interstate commerce is affected, this brief will not attempt to catalogue and dismiss all the possible affects on interstate commerce. It is sufficient to point out the general requirement that "not only must the burden strike the Court as undue or heavy, but it must be certain to affect those engaged in interstate commerce in a substantially disadvantageous way." 2 ANTIEAU, MODERN CONSTITUTIONAL LAW, p. 65-66, citing *Collins v. American Buslines,* 350 U.S. 528, 531 (1956). The instant case falls outside of that general requirement.

CONCLUSION AND PRAYER

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

THOMAS OSA HARRIS
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Houston, Texas 77024
Attorney for Respondent,
Estate of W. P. Allen, deceased.

CERTIFICATE OF SERVICE

Service was posted on all attorneys of record this _____ day of _____, 1974.

THOMAS OSA HARRIS

APPENDIX A

Tex. R. C. P. 374. Assignments of Error

The motion for new trial, when required to be filed under these rules, shall constitute the assignments of error on appeal or writ of error. A ground of error not distinctly set forth in the motion for new trial, in cases where a motion for new trial is required shall be considered as waived. Complaint of the action of the court on all matters arising under the circumstances where no motion for new trial is required by these rules, if relied upon an appeal, shall be included in the statement of points in the brief as hereinafter provided, and in such cases no assignments of error shall be necessary. Amended by order of March 31, 1941, effective Sept. 1, 1941.

Tex. R. C. P. 469. Requisites of Application

The fact that the docket of the Supreme Court is overcrowded makes it imperative that applications for writs of error be as brief as possible. The attorneys are urged to cooperate with the Court in this respect in order to reduce the work of the Court. The respondent is urged to file a reply.

The application for writ of error shall be addressed to "The Supreme Court of Texas," and shall state the name of the party or parties applying for the writ. The parties shall be designated as "Petitioner" and "Respondent." The application shall contain the following:

(a) Statement of the Case. The opinion of the Court of Civil Appeals will always be read before the application is considered; consequently the application should

not contain matter that is found in the opinion of the Court of Civil Appeals. Ordinarily it should contain only a statement of the general nature of the suit,—for instance, whether it is a suit for damages, on a note, or in trespass to try title, and that the statement as contained in the opinion of the Court of Civil Appeals is correct, except in the particulars pointed out. Example: "This is a suit for damages in excess of $1000.00 for personal injuries growing out of an automobile collision. The opinion of the Court of Civil Appeals correctly states the nature and result of the suit, except in the following particulars: (If any.)" Such statement should seldom exceed one-half page. The details of the case should be reserved to be stated in connection with the points to which they are pertinent.

(b) Statement of Jurisdiction. Except in those cases in which the jurisdiction of the Court depends on a conflict of decisions under Subdivision 2 of Article 1728, the petition should merely state that the Supreme Court has jurisdiction under a particular subdivision of Article 1728. Example: "The Supreme Court has jurisdiction of this suit under Subdivision 6 of Article 1728." Where jurisdiction of the Supreme Court depends on a conflict of decisions, the conflict on the question of law should be clearly and plainly stated.

(c) Points of Error. The points of error relied upon, separately numbered, shall be stated in short form and without argument and be germane to some assignment of error in the motion for new trial in the trial court, or otherwise saved in the statement of points as authorized by the rules, and likewise assigned as error in the motion for rehearing in the Court of Civil Appeals, and where Rule 377-a has been employed, saved in the state-

ment there authorized. If the ruling complained of originated in the Court of Civil Appeals, it must also be assigned as error in the motion for rehearing in said court.

(d) Brief of the Argument. The brief of the argument may present separately, or grouped if germane, the points of error relied upon for reversal, the argument to include such pertinent statements from the record as may be requisite, together with page references and such discussion of the authorities as is deemed necessary to make clear the points of error complained of. The opinion of the Court of Civil Appeals will be considered with the application, and statements therein, if accepted by counsel as correct, need not be repeated.

(e) Subject Index. The application shall contain at the front thereof a subject index with page references where the discussion of each point relied upon may be found and also a list of authorities alphabetically arranged, together with reference to the pages of the application where the same are cited.

(f) If any brief or application for writ of error is unnecessarily lengthly or not prepared in conformity with these rules, the court may require same to be redrawn. Amended by Order of March 31, 1941, effective September 1, 1941; by order of September 20, 1941, effective December 31, 1941; and by order of April 12, 1962, effective September 1, 1962.

SUPREME COURT, U. S.

FILED

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-1989

ERNEST SIMON, ET AL., *Petitioners*

v.

ESTATE OF W. P. ALLEN, DECEASED, ET AL., *Respondents*

On Petition for a Writ of Certiorari to the Supreme Court of Texas

MEMORANDUM FOR FIRST CITY NATIONAL BANK IN OPPOSITION

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